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Oklahoma Wins SCOTUS Red River Case

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The Supreme Court ruled last week against a North Texas water district in a dispute with Oklahoma over water in the Red River basin. In *Tarrant Regional Water District (TRWD) v. Herrmann*, the Court held that Texas did not have a right under the Red River Compact to divert water from within Oklahoma.

In 2007, the TRWD applied to the Oklahoma Water Resources Board for a permit to divert water from a Red River tributary in Oklahoma. Around the same time, it challenged Oklahoma statutes that discriminate against out-of-state permit applicants and would have led to a denial of its application. Oklahoma countered that its discriminatory statutes were allowed under the Red River Compact.

The district court and Tenth circuit sided with Oklahoma and now so has the Supreme Court, in a unanimous Sotomayor-authored opinion that approached the case as an exercise in contract interpretation. The opinion grounded its conclusion in a parsing of Compact language, presented several background principles in support of that conclusion, and then summarily dismissed a dormant Commerce Clause argument.

Compact Language

The Court began by recounting the purpose of the Compact (avoiding interstate disputes over allocations to Red River water) and by explaining that the immediate controversy concerned a particular stretch of the river – subbasin 5, Reach II, which runs from Denison Dam to the Arkansas-Louisiana state line.

In its briefing, Oklahoma had cited to vague preamble language giving signatory states broad authority over their water. The Court ignored this language and concluded that the dispute hinged on a single provision, § 5.05(b)(1):

“The Signatory States shall have *equal rights* to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided *no state is entitled to more than 25 percent* of the water in excess of 3,000 cubic square feet.”

The Court said that TWDB interpreted that provision to essentially create “a borderless common in which each of the four signatory States may cross each other’s boundaries to access a shared pool of water.” TWDB, according to the Court, based this interpretation on a two-step analysis. First, the phrase “equal rights” supposedly entitled each signatory state to equal entitlements up to a 25 percent cap. Second, § 5.05(b)(1) did not expressly limit states to water within their own borders; its silence meant that the Compact drafters did not intend to geographically confine the signatory states. In its support, the TWDB cited certain Compact provisions that expressly limited states to acting within their borders.

The Court found, however, that other Compact provisions suggested that the silence in § 5.05(b)(1) should be read as restricting states to their borders rather than empowering them to go beyond their borders.

Background Considerations

To resolve the ambiguity in the construction of § 5.05(b)(1), the Court weighed three background considerations that it found supported Oklahoma’s position. The first was “the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories.”

To illustrate the principle, the Court provided several paragraphs of quotations about state sovereignty over water resources. Interestingly, in a footnote in this discussion, the Court addressed for the only time its most recent previous case concerning water protectionism, *Sporhase v. Nebraska*. The court cited that case to support the proposition that “the power of States to control water within their borders may be subject to limits in certain circumstances. Here we deal only with whether the parties’ silence on state boundaries in the allocation of water under a compact suggests that borders are irrelevant for that allocation.”

The second background consideration was that “other interstate water compacts have treated cross-border rights explicitly ... Many of these other compacts feature language that unambiguously permits signatory States to cross each other’s borders to fulfill obligations under the Compacts... Tellingly, many of these compacts provide for the terms and mechanics of how such cross-border relationships will operate, including who can asset such cross-border rights.”

As examples, the Court cited the Amended Bear River Compact, the Kansas-Nebraska Big Blue River Compact, the Belle Fourche River Compact, the Arkansas River Basin Compact and an [amicus brief](#) from several law and political science professors.

The Court further reasoned that “[p]rovisions like these are critical for managing the complexities that ensue from cross-border diversions.” It pointed out, for instance, that if all the signatory states sought permits to divert water from Oklahoma, Oklahoma would effectively have to ensure that each state received no more than its 25 percent share. “This alone would be a herculean task because the Compact does not require ongoing monitoring or accounting ... Moreover, [Oklahoma] would be tasked with determining the priority under the Compact of applicants from other States.”

As part of this discussion, the Court rejected Texas’ contention that because the Red River’s southern vegetation line set the Texas/Oklahoma border in the eastern Texas Panhandle, the Compact drafters must have intended for states to reach across their borders for Red River Water. The Court explained that, at the time the Compact was executed, Texas’ border was the southern bank (rather than the southern vegetation line), and if Texas could have diverted water from the bank, it wouldn’t have needed to cross into Oklahoma.

(The Court said that the case didn’t require the parties to show whether Texas could have diverted from the Southern bank; but in presenting its point about diversion as a plausible practical argument, it basically made the exact assumption it said it wasn’t making: that Texas could have diverted.)

The third background consideration was the conduct under the Red River Compact to date. The Court observed that, since 1980, when Congress approved the Compact, no signatory state pressed for a cross-border diversion until the TWDB in 2007. The fact that there had been no cross-border diversions under the Compact served as an indication that there were not supposed to be cross-border diversions. (The counterpoint – not addressed by the Court – is that the Compact was intended to be forward-thinking and to head off conflicts in the future, when the drafters foresaw that demand for Red River water and competition among states could escalate.)

Dormant Commerce Clause

TWDB argued that the protectionist Oklahoma statutes violated the dormant Commerce Clause because they discriminated against interstate commerce by, in the words of the Court, “erecting barriers to the distribution of water left unallocated by the Compact.”

Instead of addressing the Commerce Clause claim directly, the Court concluded that the claim did not apply because the Compact did not leave any water unallocated. Instead, the Compact allocated twenty-five percent of the water in subbasin 5 to each of the four signatory states. “If more than 25 percent of subbasin 5’s water is located in Oklahoma, that water is not ‘unallocated’; rather, it is allocated to Oklahoma unless and until another State calls for an accounting and Oklahoma is asked to refrain from utilizing more than its entitled share.”


This reasoning makes for the weakest and most troublesome part of the decision. The Court, of course, did not need to engage the Commerce Clause arguments. It could have ignored them, as the Solicitor General recommended, and resolved the dispute by focusing on the Compact language.

Alternatively, the Court could have engaged the Commerce Clause arguments head-on by examining, for instance, the Tenth Circuit’s holding that the Commerce Clause would have ordinarily prohibited discriminatory water statutes but the Congressionally approved Compact created an exemption.

But the Court opted to reject the TWDB’s Commerce Clause arguments on a somewhat superficial semantic point. In the “unallocated” water language the Court quoted, the TWDB did not mean that the Compact left water unallocated but that, if Texas could not access a portion of its allocated share, that portion effectively became unallocated, in contravention of the Compact, which was drafted with the purpose of allocating all water in the basin.

The Court twisted TWDB’s statement and then essentially imposed a new substantive Compact term by requiring a signatory state to complete an accounting (an expensive and laborious process, to be sure) before claiming that another state is receiving more than its allocated share of water.

This reasoning could perhaps be applied to other compacts to de-allocate water the compacts have already allocated. And it leaves hanging a significant Commerce Clause question: If Oklahoma can discriminate against Texas under the Red River Compact, through state statutes that are not restricted to Texas or to Red River water, can it discriminate against other states regarding other water sources without tripping over the dormant Commerce Clause?

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